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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 569

BENJAMIN W. COREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 8-9; Pet. App. 1a-2a) is reported at 307 F. 2d 839.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1962 (R. 10). A petition for rehearing was denied on October 3, 1962 (R. 12). The petition for a writ of certiorari was filed on November 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where a judge utilized the procedure set forth in 18 U.S.C. 4208(b), the time for noting an appeal ran from the original judgment (which under the statute is for the maximum sentence) or from the time the sentence was modified to impose probation.

STATUTE AND RULES INVOLVED

18 U.S.C. 4208(b) provides:

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 32(b) provides:

> A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Rule 35 provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37(a)(2) provides in pertinent part:

> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. * * *

STATEMENT

On December 1, 1961, the petitioner was convicted by a jury in the District of Massachusetts for submitting false claims to the government in violation of

18 U.S.C. 287 (R. 3). On April 9, 1962, with petitioner and his counsel present, judgment was imposed. The judgment recited the plea and the verdict and provided that petitioner be "committed to the custody of the Attorney General or his authorized representative under the provisions of 18 U.S.C. 4208(b)" (R. 6–7). Under this commitment, petitioner was sent to the United States penitentiary at Lewisburg (R. 4).

On July 16, 1962, petitioner was brought before the district judge and, on the basis of the reports submitted by the Bureau of Prisons under the statute, was ordered placed on probation for two years (R. 5–6). This order was entered on July 17, 1962. On July 20, 1962, petitioner filed notice of appeal (R. 1–2).

The government moved to dismiss the appeal on the ground that the notice of appeal was out of time under Rule 37(a)(2), F.R. Crim. P., since judgment had been entered on April 9, 1962 (R. 4–7). The court of appeals docketed and dismissed the appeal on the government's motion (R. 8–10).

ARGUMENT

The question in this case is whether the time for appeal is computed from the date the defendant is committed for study under 18 U.S.C. 4208(b) or from the date sentence is imposed after study, where, as here, the judge decides to modify the sentence on the basis of the study. The language of the statute, its legislative history, and the cases decided thereunder support the holding of the court below that the

time for appeal begins to run at the time of the commitment.

1. The statute in terms provides that the commitment under Section 4208(b) "shall be deemed to be for the maximum sentence of imprisonment prescribed by law" and that the "term of the sentence shall run from date of original commitment under this section." Thus the statute shows that the original commitment is treated as a sentence. Since the possibility of modification is clearly contemplated by the procedure, the purpose of treating the commitment as a maximum sentence must have been to have a sentence which would conclude the criminal proceeding by a final judgment. Moreover, Rule 32(b), F.R. Crim. P., provides that a judgment of conviction shall set forth the plea, the verdict and findings, and the adjudication and sentence. The judgment filed on April 9, 1962, fully complied with these requirements and was properly treated as the final judgment from which appeal had to be taken in 10 days under Rule 37(a)(2).

2. Petitioner argues that because the statute contemplates further action by the judge, the original commitment is not a "final" judgment and hence is not ripe for an appeal. This judgment, however, was final in every significant sense relevant to appeal, for it is the trial and conviction, not the length of sentence (assuming, of course, it is within the statutory provisions), which are the subject of appellate review.

All criminal judgments are subject to reduction within 60 days under Rule 35, F.R. Crim. P., yet the period for appeal begins to run from the date of the

original criminal judgment, not from the date of the reduced sentence. And the legislative history of section 4208(b) indicates that Congress by this Act was merely extending to six months the normal 60-day period in which a court could modify a sentence (H. Rep. 1946, 85th Cong., 2d Sess., pp. 9, 10; 104 Cong. Rec. 13392; *Federal Sentencing,* Report to accompany H.J. Res. 424, S. Rep. No. 2013, 85th Cong., 2d Sess., p. 4). We would point out, moreover, that in a case where imposition of sentence is suspended, the appeal must be taken from the judgment suspending sentence, *Korematsu* v. *United States,* 319 U.S. 432, even though a sentence may later be imposed. Similarly, in the present situation, appeal should be taken from the judgment imposing commitment even though the sentence may later be reduced.

Petitioner notes that in the legislative history of this Act, the Administrative Office of the United States Courts, by letter of July 21, 1958, refers to the first commitment as a "tentative sentence" (Pet. 8–9). The adjective "tentative" is used often in the legislative history, but we suggest this usage stems from the original proposal by the Judiciary Committee on the Administration of Criminal Law. This proposal stated "* * * Upon the imposition of sentence the court may sentence in accordance with other existing provisions of law, or at its option, may impose a tentative sentence to imprisonment generally, which shall be deemed to be for the maximum term prescribed by law; * * *" (Federal Sentencing Procedure, Hearing before Subcommittee No. 3 of the

Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess., on H.J. Res. 425, p. 39). When Congress finally passed Section 4208(b), however, it eliminated the suggested adjective "tentative," thus evincing an intention that the original commitment was to be final (in the sense of concluding the criminal proceeding).

3. The only reported case dealing with the precise question involved here is in accord with the decision below. *United States* v. *Behrens,* 190 F. Supp. 799 (D. Ind.). The proposition that the original commitment is the final sentence is also supported, however, by cases holding that the defendant need not be personally present when the sentence is later reduced or affirmed. *United States* v. *De Blasis,* 177 F. Supp. 484 (D. Md.); *United States* v. *Johnson,* 207 F. Supp. 115 (E.D. N.Y.).

Petitioner misinterprets (Pet. 5) the government's position in *Grabina* v. *United States,* 369 U.S. 426. The fatal flaw in *Grabina* was not that sentence was deferred, but that both the original commitment and the ultimate sentence were imposed in the absence of the defendant, so that there was a violation of Rule 43, F.R. Crim. P. See *United States* v. *De Blasis,* 206 F. Supp. 38, 40 (D. Md.). Cf. *United States* v. *De Blasis,* 177 F. Supp. 484, 486 (D. Md.). No such problem is presented by this case.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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